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EXAMINER

WEBB, WALTER E

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RICHARD SCOTT ROBINSON, RICHARD J. SULLIVAN, and
RAJNISH KOHLI¹

Appeal 2016-006227
Application 13/817,266
Technology Center 1600

Before ULRIKE W. JENKS, JOHN E. SCHNEIDER,
And RACHEL H. TOWNSEND, *Administrative Patent Judges*.

SCHNEIDER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to oral care compositions, which have been rejected as anticipated and as obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

STATEMENT OF THE CASE

The addition of basic amino acids such as arginine to oral care composition is believed to help promote the growth of beneficial bacteria

¹ Appellants identify the Real Party in Interest as Colgate-Palmolive Company, Inc. Br. 2.

such as *S. sanguis*. Spec. ¶ 9. However, the use of amino acids in oral care compositions has proved problematic in that the amino acid can raise the pH of the composition which can cause undesirable interactions between components such as strontium and fluoride. Spec. ¶ 1. The present invention is directed to an oral care composition which overcomes the problems encountered using basic amino acids.

Claims 1, 2, 4, 5, 8, 9, 11, and 15–21 are on appeal. Claim 1 is the sole independent claim and reads as follows:

1. An oral care composition comprising
 - a. an effective amount of a basic amino acid, in free or salt form,
 - b. a water soluble strontium salt in an amount of from 0.1 % to 15% by weight; wherein the water soluble strontium salt is selected from strontium acetate; strontium chloride; strontium nitrate; strontium lactate; strontium bromide; and a combination of two or more thereof;the oral care composition being in the form of a dentifrice or a mouth rinse.

The claims stand rejected as follows.

Claim 1 has been rejected under 35 U.S.C. § 102(b) as anticipated by Hahn.²

Claim 1 has also been rejected under 35 U.S.C. § 103(a) as unpatentable over Hahn,

² Hahn et al., US 5,804,203, issued Sept. 8, 1998 (“Hahn”).

Claims 1, 2, 4, 5, and 15–17 have been rejected under 35 U.S.C. § 103(a) as unpatentable over Gibbs³ in view of Hartlaub.⁴

Claims 8, 9, 18, and 19 have been rejected under 35 U.S.C. § 103(a) as unpatentable over Gibbs in view of Hartlaub in further view of Norfleet.⁵

Claims 11, 20, and 21 have been rejected under 35 U.S.C. § 103(a) as unpatentable over Gibbs in view of Hartlaub and Norfleet in further view of Hill.⁶

ANTICIPATION

Issue

The issue with respect to this rejection is whether a preponderance of evidence supports the Examiner’s finding that claim 1 is anticipated by Hahn.

The Examiner finds that Hahn discloses topical compositions containing strontium salts such as strontium nitrate and lysine, a basic amino acid. Final Act. 2. The Examiner finds that Hahn teaches that the composition can take the form of gargles and mouthwashes. *Id.* The Examiner concludes that Hahn is anticipatory in that it teaches a composition comprising “an effective amount of a basic amino acid in free or salt form, a water soluble strontium in an amount from 0.1% to 15% by weight.” Final Act. 3.

³ Gibbs, EP 0711543 A1, published May 15, 1996 (“Gibbs”).

⁴ Hartlaub et al., US 4,871,531, issued Oct. 3, 1989 (“Hartlaub”).

⁵ Norfleet et al., US 5,240,697, issued Aug. 31, 1993 (“Norfleet”).

⁶ Hill et al., US 2009/0208428 A1, published Aug. 20, 2009 (“Hill”).

Appellants contend that Hahn does not anticipate in that the compositions of example 18 contain ingredients that render the compositions unsuitable for use as an oral care product. Appeal Br. 6. Appellants argue that the presence of glycolic acid and Germaben II are not appropriate for use in ingestible compositions. *Id.* Appellants also argue that the pH of the composition in Hahn renders it unsuitable as an oral care product. *Id.*

Analysis

We adopt the Examiner's findings of fact, reasoning on scope and content of the prior art, and conclusions set out in the Final Action and Answer regarding this rejection. We find the Examiner has established that the claims are anticipated by Hahn. Appellants have not produced evidence showing, or persuasively argued, that the Examiner's determinations on anticipation are incorrect. Only those arguments made by Appellants in the Briefs have been considered in this Decision. Arguments not presented in the Briefs are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv). We address Appellants' arguments below.

Appellants contend that the composition recited in example 18 of Hahn does not anticipate in that it is not suitable for use as a gargle or mouthwash. Appeal Br. 6. Appellants point to the inclusion of glycolic acid and Germaben II as evidence that the composition is not suitable for ingestion. *Id.* We are unpersuaded. As the Examiner points out, it was known in the art that preservatives such as glycolic acid and antimicrobials such as Germaben II have been used in oral care compositions. Ans. 7. We agree with the Examiner that the compositions encompassed in example 18

of Hahn would have been suitable for oral application. *Id.* We also not persuaded by Appellants contention that the Examiner's citation to Vermeer and Glandorf somehow establishes that Hahn's disclosure is inadequate. *See* Reply Br. 2. Here, the Examiner merely proffered evidence to rebut Appellants position that glycolic acid is indeed suitable for oral application. *See* Ans. 7.

With respect Appellants' argument regarding the pH of example 18, again we are unpersuaded. Appellants have offered no evidence other than attorney argument that the recited pH would be detrimental to teeth. Appeal Br. 6. "Attorneys' argument is no substitute for evidence." *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1581 (Fed. Cir. 1989).

Conclusion of Law

We conclude that a preponderance of the evidence supports the Examiner's conclusion that claim 1 is anticipated by Hahn.

OBVIOUSNESS

HAHN

Having affirmed the Examiner's conclusion that claim 1 is anticipated by Hahn we also affirm the Examiner's conclusion that claim 1 would have been obvious over Hahn. "It is well settled that 'anticipation is the epitome of obviousness.'" *In re McDaniel*, 293 F.3d 1379, 1385 (Fed. Cir. 2002) (quoting *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983)).

GIBBS COMBINED WITH HARTLAUB

Issue

The issue with respect to this rejection is whether a preponderance of the evidence supports the Examiner's conclusion that claims 1, 2, 4, 5, and 15–17 would have been obvious over Gibbs combined with Hartlaub under 35 U.S.C. § 103(a)

The Examiner finds that Gibbs teaches oral preparations comprising pyruvic acid or a salt thereof and arginine. Ans. 3. The Examiner finds that Hartlaub teaches an oral composition which containing strontium salts such as strontium chloride. *Id.* The Examiner concludes that it would have been obvious to one skilled in the art to add strontium to the composition of Gibbs to enhance the anti-caries capability of Gibbs. *Id.*

Appellants contend that the Examiner has not set forth a proper reason to combine the references in that Gibbs and Hartlaub use strontium for different purposes. Appeal Br. 9. Appellants also argue that one skilled in the art would not have a reasonable expectation of success in combining the teachings of the two references. Appeal Br. 10.

Analysis

We adopt the Examiner's findings of fact, reasoning on scope and content of the prior art, and conclusions set out in the Final Action and Answer regarding this rejection. We find the Examiner has established that the claims would have been obvious over Gibbs combined with Hartlaub. Appellants have not produced evidence showing, or persuasively argued, that the Examiner's determinations on anticipation are incorrect. Only those

arguments made by Appellants in the Briefs have been considered in this Decision. Arguments not presented in the Briefs are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2015). We have identified claim 1 as representative; therefore, all claims fall with claim 1. We address Appellants' arguments below.

We find Appellants' contention that there is no motivation to combine the teachings of Gibbs with Hartlaub unpersuasive. Appeal Br. 8–9. Both Gibbs and Hartlaub are directed to oral care compositions. Gibbs Abstract, Hartlaub Abstract. Gibbs teaches the use of basic amino acids such as arginine to improve the anti-caries capability of an oral care composition. Gibbs 1. Similarly, Hartlaub teaches that strontium salts can enhance the anti-caries and remineralization activity of fluoride used in oral care compositions. Hartlaub col. 1, ll. 16–18. The claimed combination is nothing more than a combination of familiar elements according to known methods which is generally found to be obvious when the results are as predicted. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007). Here Appellants have offered no evidence that the claimed composition offers unexpected results.

We are also not persuaded by Appellants' contention that one skilled in the art would not have a reasonable expectation of success. Appeal Br. 10. Appellants contend that Hartlaub does not teach that strontium would enhance the benefit of fluorine in the presence of arginine. *Id.* As the Examiner points out, Appellants have offered no evidence that arginine would “derail the reasonable expectation of success from the combination of strontium chloride and the compositions of Gibbs.” Ans. 9. Appellants have

only presented attorney argument that arginine might interfere with the action of strontium.

Conclusion of Law

We conclude that a preponderance of the evidence supports the Examiner's conclusion that claim 1 would have been obvious over Gibbs combined with Hartlaub under 35 U.S.C. § 103(a).

*GIBBS COMBINED WITH HARTLAUB AND NORFLEET and
GIBBS COMBINED WITH HARTLAUB, NORFLEET AND HILL*

Appellants' arguments with respect to these rejections are that neither Norfleet nor Hill cure the deficiencies of Gibbs and Hartlaub. As we found above, the combination of Gibbs and Hartlaub is not deficient. We therefore affirm these rejections.

SUMMARY

We affirm the rejection under 35 U.S.C. § 102(b).

We affirm the rejections under 35 U.S.C. § 103(a)

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED